IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.302 OF 2007
WITH
CHAMBER SUMMONS NO.1458 of 2007
IN
ARBITRATION PETITION NO.302 OF 2007

Novartis Vaccines & Diagnostics Inc. ..Petitioner.

V/s.

Aventis Pharma Ltd. & Ors. ..Respondents.

WITH

ARBITRATION PETITION NO.348 OF 2007

Chiron Behring Vaccines Pvt.Ltd. ..Petitioner.

V/s.

Aventis Pharma Ltd. & Ors. ..Respondents.

WITH

ARBITRATION PETITION NO.375 OF 2007

Novaris Vaccines & Diagnostic Inc. ..Petitioner.

V/s.

Aventis Pharma Ltd. & Ors. ..Respondents.

WITH

NOTICE OF MOTION NO.2490 OF 2007
IN
SUIT NO.1847 OF 2007

Aventis Pharma Ltd. ..Plaintiff.

V/s.

Novartis Vaccines & Diagnostics Inc.
& Ors. ..Defendants.

Mr.Harish Salve and Mr.Janak Dwarkadas, Senior Counsel

a/w Mr.Rahul Narichania,Ms.Meenakshi Grover, Mr.M.N. Mulla and Mr.Siddharth Thacker i/b.Mulla and Mulla for Novartis Vaccines & Diagnostics Inc.

Mr.F.S.Nariman, Sr.Counsel, Mr.D.J.Khambatta, Sr.Counsel with Mr.S.R.Kathawalla i/b. Bachubhai Munim & Co. for the Plaintiff.

Mr.Iqbal Chagla & Mr.L.Pereira, Counsel a/w Mr.Vikram Trivedi, Mr.Sachin Chandarana & Ms. Sanaya Dadachanji for the Defendant No.5, Chiron Behring Vaccines Pvt.Ltd.

Mr.Rohit Kapadia, Sr.Counsel a/w Mr.Ashish Kamat i/b. Mr.Parvez Rustomkhan for Defendant No.2.

Mr.F.Devitre, Sr.Counsel a/w Mr.Zal Andhyarujina i/b. Ms.Meena Phulbande for Defendant No.3.

Mr.Atul Rajadhyaksha, Sr.Counsel a/w Mr.S.Jagtiania and Mr.Kavas i/b. Vikram Philip & Associates for Defendant No.4.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 3, 2007.

P.C. :

1. All the above proceedings can be considered together. In this Judgment, for the sake of convenience, I shall refer to the parties as per their description in the Plaint in Suit No.1847 of 2007.

2. The Arbitration Petition No.302 of 2007 has been filed by the Defendant No.1, under Section 45 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the Act), praying that the Defendant No.1 and the Plaintiff be referred

to Arbitration in accordance with the Article 8 of the Shareholders' Agreement dated 22nd April, 1998 and Article 13.10 of the Joint Venture Agreement(hereafter referred to as JVA) dated 22nd April, 1998.

3. The Defendant No.1 has taken out Chamber Summons No. 1458 of 2007 in the above-said Arbitration Petition, for amendment of the Arbitration Petition, as per the draft amendment set out in Schedule "A" thereto.

4. The Arbitration Petition No.348 of 2007, has been filed by the Defendant No.5, under Section 45 of the Act, requesting this Court to refer the Defendant No.5 and the Plaintiff to Arbitration in accordance with the Arbitration clause contained in Article 16.11 of the Marketing and Distribution Agreement(hereinafter referred to as MDA) dated 1st May, 1998.

5. The third Arbitration Petition, being Arbitration Petition No.375 of 2007, has been again filed by the Defendant No.1, under Section 45 of the Act, requesting the Court to refer the Defendant No.1 and the Plaintiff to arbitration in accordance with

the Clause 13.10 of the JVA dated 22nd April, 1998. This Petition has been filed in response to the objection taken on behalf of the Plaintiff of mis-joinder of reliefs in the foremost Arbitration Petition. At the same time, the Defendant No.1 has filed the abovesaid Chamber Summons No.1458 of 2007, amongst others, for amending prayer clause (a) of the former Arbitration Petition No.302 of 2007 so as to restrict the relief to refer the Defendant No.1 and the Plaintiff to Arbitration in terms of Article 8 of the Shareholders' Agreement dated 22nd April, 1998 only.

6. Whereas, the Notice of Motion No.2490 of 2007 has been taken out by the Plaintiffs in the main Suit for Interim relief during the pendency of the Suit. However, for the present the Plaintiffs are claiming appropriate ad-interim relief to operate during the pendency of the Notice of Motion.

POINTS FOR CONSIDERATION:

7. Essentially, two points are required to be addressed in the present Judgment in all these proceedings taken out by the respective parties. Firstly, whether an order under section 45 of the Act

is necessitated in the fact situation of the present case? And whether such an order ought to be passed to refer the Plaintiff and Defendant No.1; Plaintiff and Defendant No.5 to a separate Arbitration or a consolidated Arbitration between Plaintiff, Defendant No.1 and Defendant No.5 ? Secondly, whether the appropriate ad-interim relief ought to be granted in favour of the Plaintiff during the pendency of the Notice of Motion ?

BRIEF FACTS:

8. The background in which the stated proceedings have been filed between the parties before this Court can be briefly stated as under :

. The Plaintiff, then a Constituent of the Hoechst Group, was established in India on 2nd May, 1956 as Hoechst Fedco Pharma Ltd. In the year 1984, Plaintiff's name was changed to Hoechst India Limited. It was again changed to Hoechst Marion Roussel Limited(HMRL) in 1996; and from the year 2001 adopted the present name. It is stated that since 2004, the Plaintiff is a constituent of the multinational Sanofi Aventis Group. The Plaintiff is in the business of manufacturing and marketing of

pharmaceuticals. It claims to have exclusive right to distribute and market 'Rabipur' anti-rabies vaccine in India.

9. It is stated that the Defendant NO.1 was earlier known as 'Chiron Corporation USA'. Prior to the takeover of Chiron Group by Novartis Group, the Defendant No.1 was a Corporation existing according to the laws of the State of Delaware, U.S.A and has its principal place of business at Philadelphia, Pennsylvania, U.S.A. The Defendant No.1 carries on business of manufacture and sale of pharmaceuticals.

10. The Defendant No.2 formerly known as Behringwerke AG and then Chiron Behring GmbH & Co., which according to the Plaintiff is wholly owned subsidiary of Defendant No.1 and controlled by Defendant No.3.

11. Defendant No.3, according to the Plaintiff, is a multinational conglomerate existing according to the laws of Switzerland having its principal place of business at Basel, Switzerland. It is engaged in the business of manufacturing and marketing of pharmaceuticals by itself and through its affiliates and/or subsidiaries throughout the world.

12. The Defendant No.4 is a Public Limited Company, whose shares are listed on Stock Exchange of India and is incorporated and registered under the Companies Act, 1956. It is an affiliate and/or a subsidiary and also a constituent of the Novartis Group, engaged in the business of manufacturing and marketing of pharmaceuticals in India.

13. Defendant No.5 is a private limited company established in October, 1997 as a joint venture company in the nature of a partnership between Chiron Corporation of USA and the Plaintiff to continue to manufacture rabies vaccine under the trade mark/brand name "Rabipur Vaccine" jointly.

14. The said product was earlier exclusively manufactured by the Plaintiff in India prior to formation of the Joint Venture(Defendant No.5). As per the Joint Venture Agreement(JVA) dated 22nd April, 1998, which formed the Defendant No.5 a Joint Venture Company, it stipulates that the Plaintiff shall have holding of 49% of the equity and the Novartis Group through Defendant No.1 shall hold balance 51% of the equity in the Defendant No.5. It is the case of the Plaintiff that Novartis Group of

Companies includes the Defendant Nos.1,2 and 4 which in turn, are directly or indirectly controlled and managed by the Defendant No.3, namely, Novartis AG. The 51% of shares to be held by the Defendant No.1 in the Defendant No.5 Joint-venture company within the meaning of the Shareholders Agreement dated 22nd April, 1998, are "beneficially owned" by Defendant No.3 Novartis AG.

15. In substance, the case of the Plaintiff is that prior to formation of the Joint Venture company(Defendant No.5), the Plaintiff was manufacturing the stated pharmaceutical products and exclusively distributing and marketing its product in India, Nepal, Bangladesh and Srilanka, which is referred to as the "HMR Territory". According to the Plaintiff, it is in the business of pharmaceuticals and vaccine in India since 1956. It is the case of the Plaintiff that prior to 1956, Behringwerke then a subsidiary of Hoechst Group was the first inventor of the Rabipur anti-rabies Vaccine(hereinafter referred to as the "Rabipur Vaccine"); and had developed proprietary technical know-how for the manufacture and production thereof consisting of technical data, documents, designs, plans, methods, process, drawings, procedures, specifications, proprietary

formulae and process for manufacture of the vaccine. After the establishment of the Plaintiff Company in 1956, the business of the Plaintiff was to manufacture some of the pharmaceutical products of Hoechst Group, import some products and exclusively distribute and market all products in the HMR Territory. It is stated that until 1989, Rubipur Vaccine was imported and exclusively marketed by the Plaintiff in the HMR Territory. All matters associated with importing and marketing- such as packing of the finished product upto the administering of the Vaccine to the affected person, the handling, transporting, distribution, marketing and storing requires special know how, technology and expertise, was provided by the Plaintiff, involving huge costs. The Plaintiff claims to have exclusive right of marketing and distribution of Rabipur Vaccine within the HMR Territory in particular. The said network(hereinafter referred to as "RMN" for Rabipur Market Network), which was the sole and exclusive properties of the Plaintiff. In 1989, the Plaintiff established an undertaking for the manufacture of Rabipur Vaccine at Ankleshwar, Gujarat and commenced manufacturing and production of Rabipur Vaccine. The Rabipur Vaccine so produced was and continues to be distributed and marketed through RMN

by the Plaintiffs.

16. It is the case of the Plaintiff that in or around February, 1996, the vaccine business of Behringwerke including that of Rabipur Vaccine was transferred to Chiron Corporation, excluding the business of the Plaintiff of manufacturing and marketing Rabipur Vaccine in HMR Territory. The Plaintiff however, continued to exclusively manufacture, market and distribute Rabipur Vaccine in HMR Territory even after the said transfer in favour of Chiron Corporation. Lateron, Chiron Corporation entered into a Secrecy Agreement on 5th February, 1997 for a possible joint venture in India for vaccine business. The said Chiron Behring, Germany, and the Plaintiff, also executed a Registered User Agreement in respect of the trade mark "Rabipur" to enable the Plaintiff to continue to use the said trade mark in relation to the manufacture of Rabipur Vaccine in India. Thereafter, an Agreement for supply of Seed Virus dated 5th May, 1997 was executed between the Chiron Behring and the Plaintiff. The said Seed Virus is one of the raw materials for the manufacture of Rabipur Vaccine. The said Chiron Behring then executed a license and Technical Collaboration Agreement dated 6th May, 1997 in

relation to technical information for the manufacture of Rabipur Vaccine, which license was intended and used solely to apply to the Indian Government for its permission under Foreign Exchange Regulation Act, 1973 to pay to Chiron Behring a royalty on the Rabipur Vaccine.

17. In due course, the letter of intent was signed between the Plaintiff and Chiron Corporation on 17th July, 1997 setting out proposed terms and conditions for establishing a joint venture to jointly "manufacture" Rabipur Vaccine in a joint venture company to be established in which Chiron Corporation will have 51% equity and the Plaintiff would have 49% equity. It was proposed that Joint venture company will purchase and the Plaintiff will sell "only the manufacturing facility" for the production of Rabipur Vaccine for the price noted therein as on 31st March, 1997.

18. To consummate the said letter of Intent, the parties executed following definitive agreements:

(a) Financial Collaboration Agreement dated 21st April, 1998 between the JV Company(Defendant No.5), Chiron Corporation

USA(Defendant No.1) and the Plaintiff, which provided Defendant No.1 and the Plaintiff to subscribe for and acquire equity shares in the JV Company(Defendant No.5) in the proportion of 51:49 respectively.

(b) Joint Venture Agreement dated 22nd April, 1998 between Defendant No.1 and the Plaintiff, which provides for the terms and conditions of the joint venture between the parties.

(c) Shareholders Agreement dated 22nd April, 1998, between Defendant No.1 and the Plaintiff, wherein parties agreed to maintain ownership and control of joint venture company between themselves in the manner and on the terms set forth in the JVA. The said agreement is for the purpose of ensuring continuity of the management of their investment in the joint venture company and agreed to exercise their votes at general meeting fully and faithfully in terms of the Agreement.

(d) Marketing and Distribution

Agreement(HMR Territory) dated 1st May, 1998, between the Defendant No.5 company and the Plaintiff, providing for terms and conditions on the basis of which the Plaintiff shall purchase from the Defendant No.5 and Defendant No.5 shall sell to the Plaintiff stated quantity of products, as the Plaintiff may order from time to time in accordance with the terms of the Agreement.

(e) Marketing and Distribution Agreement(Chiron Territories) dated 1st May, 1998, between the Defendant No.5 and Defendant No.1 which provides for the sale of the Rabipur Vaccine manufactured by the Defendant No.5 to Defendant No.1 for sale in territory other than HMR Territory.

(f) Service contract dated 1st May, 1998, between the Plaintiff and Defendant No.5, providing for certain services and supplies to be offered by the Plaintiff to the joint venture company(Defendant No.5).

(g) The Trade name and Trade Mark licence Agreement dated 1st May, 1998 between the

Defendant No.2 and Defendant No.1, whereunder the Defendant No.2 and Defendant No.1 as Licensors granted to Defendant no.5 a license to use "Chiron" mark and "Behring" mark as part of the trade mark "Chiron Behring" for use in connection with the Defendant No.5-J.V.Company's product and to use said marks as part of the corporate and trade name of the Defendant No.5(JV company) and the "Rabipur mark" for use in connection with the rabies vaccine.

(h) License and Technical Collaboration Agreement dated 1st June, 1998 between the Defendant No.2 and Defendant No.5, whereunder the Defendant No.2 granted to the Defendant No.5 an exclusive non-transferable license under the Patents & Technical Information to manufacture the Rabipur Vaccine in India, Nepal, Sri Lanka and Bangladesh.

19. It is the case of the Plaintiff that as per the JVA, the Plaintiff sold and transferred to the Defendant No.5 joint venture company, only the manufacturing facility consisting of land, building, plant and machinery situated at Ankleshwar. The

Plaintiff then asserts that until early 2006, the parties to the joint venture faithfully adhered to the fundamental basis of the understanding, terms and conditions of the joint venture. However, the trouble started after Novartis Group took over Chiron Corporation USA and its subsidiaries and affiliates and succeeded to the rights and obligations of Defendant No.1 and of Chiron Behring in the joint venture and the JV company. It is the case of the Plaintiff that in an attempt to take over the distribution and marketing of Rabipur Vaccine in the HMR Territory which exclusively vested in the Plaintiff and preserved under the JVA, Novartis Group formed a vaccine division and identified India as a strategic country for future vaccines growth in the name of Defendant NO.5 JV company. That has been done in breach of JVA and the Distribution Agreement. The Novartis Group also caused to issue notice of non-renewal dated 27th September, 2006 of the Distribution Agreement from 1st May, 2008. According to the Plaintiff, to create false evidence of participation of the directors of the Plaintiff and having consented to the issuance of Notice of non-renewal, Ms.Phoebe Kornfeld a nominee director of Novartis Group on the Board of the JV company as the Chairperson of that meeting has forged and fabricated

minutes of the Board Meeting dated 27th September, 2006. In paragraph-26 of the Plaint, the Plaintiff has asserted that by such illegal action the Novartis Group threatened to violate the Plaintiff's exclusive right to distribute and market Rabipur Vaccine in the HMR Territory, which were not transferred by the Plaintiff to the joint venture company and in fact have been specifically excluded from the JV Agreement, which was sole and exclusive property of the Plaintiff. From paragraph-27 to 45 of the Plaint, the Plaintiff has given the events as unfolded, resulting in issuance of Notice of non-renewal of the Distribution Agreement dated 1st May, 1998 which is to expire by the end of 30th April, 2008. In paragraphs-46 to 57 of the Plaint, the Plaintiff has adverted to the reasons as to why the Notice of non-renewal was expressly in breach of the provisions of JV Agreement and the Distribution Agreement. In paragraph 58 of the Plaint, it is asserted that the Novartis Group is already in the process of preparing itself to take over the marketing of the Rabipur Vaccine in India by appointing Novartis India Ltd.(Defendant No.4) as a distributor of Rabipur Vaccine in India. In paragraph-59 the Plaintiff has asserted that they are holders of 49% of the equity share in the joint

venture company (Defendant No.5) and were entitled to file the present Suit as a derivative action for and on behalf of and for the benefit of the JV company on account of unlawful acts of Novartis Group committing breach, which was clearly against the interest of JV company. More importantly, on account of the oppression of the Plaintiff who were the minority group and also in public interest. In paragraph-60 of the Plaint the Plaintiff asserts that in the meeting of 14th June, 2007, for considering the accounts of the JV Company for the financial year ending 31st March, 2007, representative director of Novartis Group suggested that provision be made in the accounts for litigation expenses anticipating litigation by the Plaintiff. The Plaintiff apprehends that the Novartis Group will cause the Defendant No.5 joint venture company to spend on the litigation expenses, which will not be in the interest of the Defendant No.5-joint venture company. It is stated that such suggestion was indicative of the mis-management of the affairs of the joint venture company, being conducted in a manner prejudicial to the public interest and to the interest of the joint venture company by the Novartis Group who were in majority. In this background, the Plaintiff has approached this Court for the following

reliefs:

"The Plaintiff, therefore, prays:

(a) that it be declared that the Marketing & Distribution Agreement(HMR Territory) dated 1st May, 1998 shall stand renewed from 1st May, 2008 to 30th April, 2018 with all its terms and conditions including Article 5.9 of the Joint Venture Agreement dated 22nd April, 1998;

(b) it be declared that the Notice of Non-renewal dated 27th September, 2006 (Exhibit"I" hereto) is void, illegal and ineffective;

(c) it be declared that the Minutes of the Board Meeting of Defendant No. 5 held on 27th September, 2006 as written up in its Minutes Book with regard to the item "to review the Company's distribution arrangement" are void and of no effect;

(d) it be ordered and decreed that Defendant No.5 do cancel the Minutes of the Board Meeting of Defendant No.5 held on 27th September, 2006 as written up in its Minutes Book with regard to the item "to review the Company's distribution arrangement".

(e) by a permanent order and injunction of this Hon'ble Court the Defendants their officers, employees and agents, be restrained from directly or indirectly giving effect to or acting in any manner on the basis of the said Notice of non-renewal dated 27th September, 2006 (Exhibit "I" hereto);

(f) by a permanent order and injunction the Defendants, their officers, employees and agents, be restrained from in any manner directly or indirectly obstructing or interfering with or preventing the automatic renewal of the the Marketing & Distribution Agreement(HMR Territory) dated 1st May, 1998 from 1st May, 2008 to 30th April, 2018;

(g) the Defendant No.5 be ordered and decreed to sell to the Plaintiff Rabipur

Vaccine on the terms and conditions of the Marketing & Distribution Agreement throughout the balance of the initial term of ten years ending on 30th April, 2008 and thereafter for the further renewed period of ten years ending 30th April, 2018 and thereafter until such time as the Joint Venture Agreement or the Marketing & Distribution Agreement is not validly terminated as provided by the Joint Venture Agreement;

(h) by a permanent order and injunction the Defendants their officers, employees and agents, be restrained from directly or indirectly selling the Rabipur Vaccine in the HMR Territory or any part thereof except to the Plaintiff as provided in the Joint Venture Agreement dated 22nd April, 1998 and the Marketing & Distribution Agreement (HMR Territory) dated 1st May, 1998;

(i) by a permanent order and injunction Defendants, their officers, employees and agents, be restrained from marketing or distributing Rabipur Vaccine in the territory of India and Nepal or any part thereof in breach of the Plaintiff's exclusive right to market and distribute the Rabipur Vaccine in those territories;

(j) by a permanent injunction Defendant Nos. 1 to 4 or any other affiliate or subsidiary of the Novartis Group be restrained from directly or indirectly carrying on in India any anti-rabies vaccine business.

(k) permanent injunction restraining Defendant Nos. 1 to 4 their officers, employees and agents from utilizing any of the funds of Defendant No.5 to contest these proceedings;

(l) such orders be passed as to this Hon'ble Court may deem fit to bring to an end and/or prevent the affairs of Defendant No.5 being conducted by Defendant Nos. 1 to 4 in a manner prejudicial to the public interest and in a manner oppressive to the Plaintiff;

(m) pending the hearing and final

disposal of the suit, this Hon’ble Court will be pleased to pass:

(i) temporary order and injunction restraining the Defendants their officers, employees and agents from directly or indirectly giving effect to or acting in furtherance of the Notice of non-renewal dated 27th September, 2006(Exhibit "I" hereto);

(ii) temporary order and injunction restraining Defendant No.5, its officers, employees and agents from in any manner directly or indirectly selling the Rabipur Vaccine in the HMR Territory i.e. Territory of India and Nepal or any part thereof except to the Plaintiff as provided in the Joint Venture Agreement dated 22nd April, 1998 and the Distribution Agreement dated 1st May, 1998;

(iii) temporary order and injunction restraining Defendant No.5, its officers, employees and agents from appointing either of the Defendants No.1 to 4 or any third party as a distributor or in any other capacity to distribute and market the Rabipur Vaccine in the HMR Territory i.e. Territory of India and Nepal;

(iv) temporary order and injunction restraining Defendant No.5, its officers and employees from in any manner directly or indirectly contributing or paying towards the costs, charges and expenses of Defendant Nos. 1 to 4 in the proceedings in this suit;

(v) temporary order and injunction restraining Defendant Nos. 1 to 4 or any of them from directly or indirectly carrying on anti-rabies vaccine business in India.

(vi) temporary order and

injunction restraining Defendant Nos. 1 to 4, their officers, employees and agents from utilizing any of the funds of Defendant No.5 to contest these proceedings;

(vii) pass such interim orders as to this Hon'ble Court may deem fit including order appointing a fit and proper independent person to preside as a Chair person at the meetings of the Board of Directors and at the Shareholders meetings of the Defendant No.5.

(n) for interim and ad-interim reliefs in terms prayer clause (m), (i) to (vii) above;

(o) for costs of this suit; and

(p) for such further and other reliefs as the nature and circumstances of the case may require."

20. Besides, the Plaintiff has taken out Notice of Motion No.2490 of 2007 alongwith the above said Suit praying for interim relief during the pendency of the Suit. Reliefs claimed in the Motion read thus:

"(a) that pending the hearing and final disposal of the Suit, this Hon'ble Court may be pleased to pass:

(i) temporary order and injunction restraining the Defendants their officers, employees and agents from directly or indirectly giving effect to or acting in furtherance of the Notice of non-renewal dated 27th September, 2006(Exhibit "I" hereto);

(ii) temporary order and injunction restraining Defendant No.5, its officers,

employees and agents from in any manner directly or indirectly selling the Rabipur Vaccine in the HMR Territory i.e. Territory of India and Nepal or any part thereof except to the Plaintiff as provided in the Joint Venture Agreement dated 22nd April, 1998 and the Distribution Agreement dated 1st May, 1998;

(iii) temporary order and injunction restraining Defendant No.5, its officers, employees and agents from appointing either of the Defendants No.1 to 4 or any third party as a distributor or in any other capacity to distribute and market the Rabipur Vaccine in the HMR Territory i.e. Territory of India and Nepal;

(iv) temporary order and injunction restraining Defendant No.5, its officers and employees from in any manner directly or indirectly contributing or paying towards the costs, charges and expenses of Defendant Nos. 1 to 4 in the proceedings in this suit;

(v) temporary order and injunction restraining Defendant Nos. 1 to 4 or any of them from directly or indirectly carrying on anti-rabies vaccine business in India.

(vi) temporary order and injunction restraining Defendant Nos. 1 to 4, their officers, employees and agents from utilizing any of the funds of Defendant No.5 to contest these proceedings;

(vii) pass such interim orders as to this Hon'ble Court may deem fit including order appointing a fit and proper independent person to preside as a Chair person at the meetings of the Board of Directors and at the Shareholders meetings of the Defendant No.5.

(b) for interim and ad-interim reliefs in terms of prayer clause (a)(i) to (vii) above;

(c) that the cost of this Notice of Motion be provided for; and

(d) for such further and other reliefs as the nature and circumstances of the case may

require."

21. While the aforesaid Motion was pending for hearing, the Defendant No.1 filed Arbitration Petition No.302 of 2007 under Section 45 of the Act on 12th July, 2007, for the following reliefs:

> "(a) that this Hon'ble Court be pleased to refer the Petitioner and the 1st Respondent to Arbitration in accordance with Article 8 of the Shareholders Agreement dated 22nd April 1998 and Article 13.10 of the JV Agreement dated 22nd April, 1998;
>
> (b) that this Hon'ble Court be pleased to pass such other orders and directions as may be necessary with regard to prayers (a) above;
>
> (c) that pending the hearing and final disposal of this Notice of Motion this Hon'ble Court be pleased to stay the hearing of Notice of Motion No.2490 of 2007 in Suit No.1847 of 2007 filed by the 1st Respondent in this Hon'ble Court;
>
> (d) for ad interim reliefs in terms of prayer (a) to (c) as the case may be;
>
> (e) for costs of this Notice;
>
> (f) for such other and further reliefs as the nature and circumstances of the case may require."

22. Lateron, the Defendant No.5 filed Arbitration Petition No.348 of 2007 under section 45 of the Act on 4th August, 2007, for the following reliefs:

"The Petitioner therefore prays that :

(a) that this Hon'ble Court be pleased to refer the Petitioner and the 1st Respondent to Arbitration in accordance with the arbitration agreement contained in Article 16.11 Marketing and Distribution Agreement dated 1st May 1998;

(b) that this Hon'ble Court be pleased to pass such other orders and directions as may be necessary with regard to prayers (a) above;

(c) that pending the hearing and final disposal of this Notice of Motion this Hon'ble Court be pleased to stay the hearing of Notice of Motion No.2490 of 2007 in Suit No.1847 of 2007 filed by the 1st Respondent in this Hon'ble Court;

(d) for ad-interim reliefs in terms of prayer (a) to (c) as the case may be;

(e) for costs of this Notice;

(f) for such other and further reliefs as the nature and circumstances of the case may require."

23. In the light of the stand taken by the Plaintiff in relation to the mis-joinder of reliefs claimed by the Defendant No.1 in the former Arbitration Petition, in respect of two separate Arbitration Agreements, the Defendant No.1 filed separate Arbitration Petition No.375 of 2007 under Section 45 of the Act, for following reliefs:

"The Petitioner therefore prays that:

(a) that this Hon'ble Court be pleased to refer the Petitioner and Respondent No.1 to

Arbitration in accordance with Article 13.10 of the JV Agreement dated 22nd April 1998;

(b) that this Hon'ble Court be pleased to pass such other orders and directions as may be necessary with regard to prayer (a) above;

(c) that pending the hearing and final disposal of this Arbitration Petition this Hon'ble Court be pleased to stay the hearing of Notice of Motion No.2490 of 2007 in Suit No.1847 filed by Respondent No.1 in this Hon'ble Court;

(d) for ad interim reliefs in terms of prayer (a) to (c) as the case may be;

(e) for costs of this Petition;

(f) for such further and other reliefs as the nature and circumstances of the case may require."

24. Simultaneously, the Defendant No.1 filed Chamber Summons No.1458 of 2007, in the pending Arbitration Petition No.302 of 2007, on 4th September, 2007, praying for amendment of the former Arbitration Petition, interalia, for deleting relief claimed with reference to Article 13.10 of the Joint Venture Agreement dated 22nd April, 1998. Defendant No.1 instead as aforesaid, filed separate Arbitration Petition No.375 of 2007 for that relief.

25. The aforesaid three Arbitration Petitions have since been assigned by the learned Chief Justice to be heard alongwith the Notice of Motion filed by the Plaintiff for interim relief during the pendency

of the Suit. Accordingly, all these proceedings have been proceeded together, by consent.

26. The argument on behalf of the Plaintiff was advanced by Mr. Fali Nariman i/b.D.J.Khambatta. The Defendant No.1 was represented by two different counsels in the respective Arbitration Petitions. Mr.Harish N.Salve i/b. Mr.Rahul Narichania appeared in Arbitration Petition No.302 of 2007, whereas Mr. Janak Dwarkadas i/b.Meenakshi Grover appeared in Arbitration Petition No.375 of 2007, for Defendant No.1. Mr.Iqbal Chagla i/b.Mr. Vikram Trivedi appeared in the Arbitration Petition No.348 of 2007, for Defendant No.5. Defendant Nos. 2,3 and 4 have been represented by Mr.Rohit Kapadia i/b.Mr.Parvez Rustomkhan, Mr. F.Devitre i/b. Ms.Meena Phulbande and Mr.Atul Rajadhyaksha i/b. Mr.S. Jagtiania respectively. The Defendant Nos. 2 and 3 however, have appeared in the proceedings without submitting to the jurisdiction of this Court. GIST OF RIVAL SUBMISSIONS: 27. The fulcrum of the argument of the Defendant Nos. 1 and 5 was that the cause of action on the basis of which the present suit has been filed by the Plaintiff and for the nature of reliefs claimed, the Suit was in respect of matters covered by the respective Arbitration Agreements,

provided in the three separate agreements, namely, JVA, Shareholders Agreement and Distribution Agreement. In that view of the matter, the Plaintiff and the respective Defendants should be referred to Arbitration for resolution of the disputes or differences which have arisen between the parties in relation to the legal relationship emanating from the respective agreements, in view of the mandate of Section 45 of the Act. According to these Defendants, as the whole subject matter in the Suit revolves around the Distribution Agreement, which in turn is the related agreement to the JVA, dispute brought by the Plaintiff before this Court can be resolved only by way of Arbitration. For, no matter in the Suit filed by the Plaintiff was outside the arbitration agreement, for which reason the parties should be referred to arbitration.

28. On the other hand, in substance, the stand of the Plaintiff, is that, the Plaintiff was obliged to the file Suit-as there was no arbitration agreement to which all the parties to the Suit are the parties and each of the parties have not signed the arbitration agreement in respect of the entire subject matter of the Suit. It is next contended that the separate arbitration clauses contained in

the JVA and Related Agreements are signed only by the parties to the respective agreements; besides there is possibility of two or more Arbitrations as per the separate clauses under JVA and the Related Agreements in relation to the subject matter of the present Suit, resulting in arbitration agreement becoming inoperative or incapable of being performed. This is the core controversy which is required to be resolved in the present Judgment.

CONSIDERATION OF POINTS IN ISSUE:

29. The fact that the three separate agreements, namely, JVA, Shareholders Agreement and Distribution Agreement, independently provide for arbitration agreement is not in dispute. Moreover, it is common ground that the said agreements are governed by Part II of the Act, dealing with the enforcement of certain foreign awards, in particular, New York Convention Awards. In that, it is common ground that the three agreements are governed by section 44(a) of the Act. It is also common ground that Defendant Nos. 2 to 4 are not parties to any of these agreements.

30. The gravamen of the rival submission is

whether it is open to this Court to refer only the Plaintiff and Defendant No.1 and/or Defendant No.5, to arbitration, leaving out Defendant Nos. 2,3 and 4, who are admittedly not parties to the Arbitration Agreements. In that, is it open to the Court to separate the action by referring only the Plaintiff and the Defendant No.1 and/or Defendant No.5 to give effect to the arbitration agreement which is otherwise operative between them. Alternatively, is it open to this Court to refer all the parties to the suit(including Defendant NOs. 2 to 4) to Arbitration under the respective Arbitration Agreements or for that matter to a consolidated Arbitration. According to the Plaintiff the suit brought before this Court not only involves third parties, plurality of agreements but also involves other disputes not covered by the arbitration agreements which are so inextricably connected with the issues associated with the arbitration agreements that the same cannot be segregated.

31. To consider all the above aspects, it becomes necessary to first examine the sweep of Section 45 of the Act. Section 45 of the Act reads thus:

> "**45. Power of judicial authority to refer parties to arbitration.**-Notwithstanding

> anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It will be useful to also refer to the relevant corresponding provision in the first Schedule to the Act reproducing the Convention on the Recognition And Enforcement of Foreign Arbitral Awards, in particular Article II thereof. The same reads thus :

> "**Article II**
>
> 1. Each Contracting State shall recognize and agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "**agreement in writing**" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being

performed."

32. There can be no debate that Section 45 of the Act is reiteration of the Principle articulated in Clause (3) of Article II of the New York Convention. The opening part of Section 45 additionally postulates that the provision made therein is made notwithstanding anything contained in Part I of that Act(which deals with matters in relation to domestic arbitration) or in the Code of Civil Procedure, 1908.

33. In the setting in which section 45 is couched, the Defendants would contend that even if there are third parties in the action brought before the Court, but as the issues raised in the suit are squarely governed by the arbitration agreement which is valid and binding on the Plaintiff and the Defendant No.1 or Plaintiff and Defendant No.5 as the case may be, in so far as those issues, the said parties to the arbitration agreement will have to be relegated to arbitration. That is the mandate of Section 45. The only exception is where the Court finds that the arbitration agreement was null and void, inoperative or incapable of being performed. On the other hand, according to the Plaintiff, Section 45 will be of avail only in matters where

"all the parties to the Suit" brought before the Court are also parties to the arbitration agreement and not otherwise. That is the threshold requirement of section 45 of the Act, contends the learned Counsel for the Plaintiff.

34. From the setting of Section 45 of the Act, it does appear that it is in two parts. The former part is the threshold requirement, which requires "all the parties to the action" are parties to the arbitration agreement. Only in that case, at the request of one of the party to the suit or any person claiming through or under him, the Court in exercise of powers under section 45 may refer the parties to arbitration. Even if the threshold requirement is fulfilled, however, if the Court were to find that the arbitration agreement is null and void, inoperative or incapable of being performed, the request to refer the parties to arbitration under Section 45, cannot be countenanced.

35. Reverting to the former part of Section 45, the moot question is whether all parties to the Suit should necessarily be parties to the arbitration agreement. If the argument of the Defendants that the expression "parties" occurring at three different

places in Section 45, should only mean parties to arbitration agreement and not to be read as parties to the suit, if accepted, would inevitably require the Court to hold that all parties to the Suit should not necessarily be parties to the arbitration agreement. In my opinion, the Plaintiff is right in contending that the interpretation put forth by the Defendants is not the natural meaning to be given to the language of Section 45 of the Act. Instead, the Court can exercise power under Section 45 to refer the parties (all parties to the suit) who are necessarily parties to arbitration agreement to arbitration. Section 45 presupposes that the whole matter brought before the Court and all the parties to the action should be referred to arbitration. There is nothing in Section 45 or any other provision of the Act which would enable the Court to split the parties or the cause in the suit. This Scheme regarding the power of the Court is comparable to the regime of domestic arbitration governed by Section 8 of the Act. Section 8 of the Act reads thus:

> "8. **Power to refer parties to arbitration where there is an arbitration agreement.-** (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the

> dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

36. I am conscious of the fact that the matter on hand relates to arbitration governed by New York Convention. Indeed, there are distinguishing features in both these sections. In proceedings under section 8 of the Act, unlike in matter governed by Section 45 of the Act, the Court is not required to additionally find that the arbitration agreement is null and void, inoperative or incapable of being performed. That is peculiar to proceeding under section 45 of the Act. There is other distinguishing feature between section 8 and section 45 of the Act. The remedy under section 45 can be resorted to at any time, unlike under section 8 of the Act where party has to apply for that remedy not later than submitting his first statement of the substance of the dispute. Although both these provisions are differently worded, the purpose of both is to refer the parties to arbitration. Both these sections are comparable to

the extent that they deal with the power of judicial authority to refer parties to arbitration. Section 8 deals with domestic arbitration and Section 45 with Arbitration to which regime of New York Convention would apply. On accepting this position, the controversy gets narrowed down. Inasmuch as, the power of the Court under section 8 of the Act has already been the subject matter of decision of the Apex Court in the case of **Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya & Anr. reported in AIR 2003 SC 2252.** The Parameters expounded in the said decision will inevitably govern the sweep of section 45. In the said decision, the Apex Court, in the first place held that the Act of 1996 does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under section 8 of the Act(read Section 45 of the Act for the present case). The Court then found that there was no provision in the Act that when the subject matter of the suit includes the subject matter of the arbitration agreement as well as other disputes, the matter is still required to be referred to arbitration. It then found that there is no provision for splitting the cause or parties and referring the subject matter of the suit to arbitration. It is also

noted that there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. In either of these situations, the Court proceeded to conclude that, the provisions of section 8 of the Act will be of no avail. It is plainly held that the words "a matter" in the provision would indicate the entire subject matter of the suit should be subject to arbitration agreement. If there are other disputes, in that case, recourse to arbitration would result in requiring the Court of bifurcating the subject matter of the suit, which was not contemplated by the Legislature. Besides, that would invite possibility of conflicting judgments and orders of two different forums. It has also noted that unlike provision of section 24 of the Arbitration Act, 1940, now there is no such power in the Court to continue with the suit against the parties who are not parties to the arbitration agreement. The abovesaid principles expounded by the Apex Court in **Sukanya Holdings Pvt.Ltd.(supra)** would apply on all fours while considering a matter governed by Section 45 of the Act. A priori, the only natural meaning that can be ascribed to the word "parties" appearing in the first part of Section 45 is the parties in an action, which would necessarily mean all parties in that action must

be parties to the same arbitration agreement.

37. To get over this position, Counsel for the Defendants would contend that the decision in **Sukanya Holdings Pvt.Ltd.'s case(Supra)** will have no bearing on the construction of section 45 of the Act. Firstly because, **Sukanya's case** dealt with the interpretation of section 8 of the Act which is concerning domestic arbitration; whereas section 45 deals with international arbitration governed by New York Convention. Under the New York Convention, it is mandatory to refer the parties to arbitration and the Court has no option. It is then contended that the view expressed in **Sukanya's case** is per incuriam as it has not taken into account the exposition of the Apex Court of larger Bench in **Svenska Handelsbanken and ors. V/s.M/s.Indian Charge Chrome Ltd. & Ors.[(1994) 2 SCC 155]**. In that case, contends the learned Counsel for the Defendants, the parties to the Suit were parties to three contracts which provided for arbitration agreements. Nevertheless, the Apex Court reversed the view taken by the High Court that since plaint does not make separable allegations against different defendants who are parties to the different contracts, with different arbitration agreements and the allegations made by the Plaintiff against

different defendants are such that they cannot be separated from each other and since arbitration between the Plaintiff and different defendants may have to go to different arbitrators, all the arbitration clauses must be treated as having become inoperative. Emphasis was placed on paragraph-43 of this decision, wherein it is noted that the Plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different party under the different contract, particularly when the right to foreign arbitration has been provided by Parliament as an indefeasible right in which the court, does not have any kind of discretion.

38. In my opinion, the first argument of the Defendants that the provisions of the section 8 regarding the power of the Court is in contrast to section 45 of the Act, will have to be stated to be rejected. As is noted earlier, the material requirements for exercising power by the Court to refer parties to arbitration in both the provisions is similar, except the additional requirements provided by Section 45 to which I have already adverted to before. That additional enquiry to be made by the Courts under Section 45 would make no difference to

the threshold requirement for the Court to exercise its power bestowed by the legislation, either be it a case of domestic arbitration or the international arbitration regime.

39. True it is, that section 45 makes it mandatory to refer the parties to arbitration, provided the threshold requirement specified therein have been fulfilled. As already noted earlier, the threshold requirement of section 45 is that the entire subject matter of the suit is covered by the arbitration agreement between all the parties to the Suit. For, there is no provision for separating causes or parties while referring the subject matter of the Suit to arbitrator nor there is provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement, under the present enactment; In such cases, the former part of Section 45 would remain unfulfilled. Those are jurisdictional matters. In absence thereof, the Court cannot assume jurisdiction under section 45 of the Act, even if the court is of the opinion that there is otherwise a valid and binding arbitration agreement operating between the parties which is capable of being performed.

40. It was argued by the Defendants that the first part of section 45 cannot be divorced from the second part thereof. This argument overlooks that the issues relevant for deciding the later part can be looked into only if the former part of section 45 requiring "all the parties to the suit" or legal action brought before the Court "must" be parties to the arbitration agreement is fulfilled. If there are extra parties to the suit and if there is extra subject matter in the suit, it will be a case of non-compliance of the threshold requirement of Section 45 of the Act.

41. The Counsel for the Defendants had placed reliance on the statement of objects and reasons in particular notes on clauses to indicate the difference in the sweep of section 8 and section 45. Section 8 of the Act deals with the domestic arbitration. Relevant notes on clause relating to Section 8 mentions that it provides for the power of judicial authority to refer the matters to arbitration. Whereas, the notes on clause in respect of section 45 observes that the provision makes it mandatory for any judicial authority when seized of action in a matter in respect of which an arbitration agreement exists to refer the parties to arbitration. Relying on this difference, it was argued that legislative intent will

be whittled down if the Court were to hold that the provision can be invoked only when all the parties to the Suit are also parties to the arbitration agreement. It is well established that notes on clauses would be a useful tool to interpret the section, but the Court has to address the matter on the basis of the text of the provision which falls for its interpretation. On analysing the scheme of section 45 and the setting in which it is placed, as already found earlier, it is not open to take any other view in absence of express provision in the Act of 1996 empowering the Court to do so.

41A. The Counsel for the Defendants, relying on the definition of expression "Party" appearing in Section 2(1)(h), would contend that the word "Parties" appearing in section 45 will have to be understood to mean as party to an arbitration agreement and not the parties to the suit. It is not possible to countenance this submission for more than one reason. In the first place, Section 2 of the Act itself stipulates that the meaning given of the respective terms in that section is, unless context otherwise requires. In other words, the context in which the word "parties" appear in the former part of section 45 will have to be construed on the basis of the setting

in which the same is placed and not governed by the limited meaning of the word "party' given in section 2(1)(h). In addition, it is doubtful whether the definition of word "party" given in section 2 of the Act can be of any use, while considering the matter on hand, which is governed by Part-II of the Act dealing with the New York Convention Awards. Section 45 of the Act opens with non-obstante clause and clearly provides that the provision made therein is notwithstanding anything contained in Part-I of the Act or in the Code of Civil Procedure, 1908. The definition of word "party" given in section 2 forms part of Part-I of the Act. Be that as it may, the expression "parties" appearing in the former part of section 45 will have to be considered in the context and in the setting in which it appears. The only natural meaning to be given to the said expression is "(all) the parties to action" before the judicial authority, in respect of which the parties have made arbitration agreement referred to in Section 44 of the Act.

42. Counsel for the Defendants had also invited my attention to the dictionary meaning in **Strout's Judicial Dictionary of Words and Phrases 6th Edition** as well as **Collins New English Dictionary** with regard

to the word "unless", which is appearing in section 45 of the Act, to contend that the legislative mandate is to refer the parties to arbitrator in so far as international arbitration is concerned and the only exception envisaged is where the agreement itself was null and void or inoperative or become incapable of being performed. It is not possible to countenance such argument. The Section will have to be construed as a whole. The Section cannot be split on the basis of word "unless" occurring therein, as is suggested by the Counsel for the Defendants.

43. That takes me to the argument of the defendants that the decision of the Apex Court in **Sukanya's case** is per incuriam. I am in agreement with the argument of the Plaintiff that the two decisions of the Apex Court- in **Sukanya's case** and the **Svenska's case**-deal with different enactments having different import. In the first place, the decision in **Svenska's case** is on the provisions of section 3 of the Foreign Awards(Recognition and Enforcement) Act, 1961. The said Act has been repealed, upon enactment of the Act of 1996. The sweep of section 3 of the Foreign Awards Act was altogether different from the authority of the Court under section 45 of the Act. Section 3 of the Foreign Awards (Recognition and

Enforcement)Act, 1961 reads thus:

> "3. **Stay of proceedings in respect of matters to be referred to arbitration.-** Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

The above provision was analogous to section 34 of the Arbitration Act, 1940 which read thus:

> "34. **Power to stay legal proceedings where there is an arbitration agreement.-** Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not

> be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

In addition to section 34 of the Arbitration Act, 1940, it will be useful to refer to section 24 of the Arbitration Act 1940 which read thus:

> "**24. Reference to arbitration by some of the parties.-** Where only some of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and the manner provided by Sec. 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application."

44. Indeed, the purport of Section 3 of the Foreign Awards Act has been expounded by the Apex Court and is no more res integra. Reliance can be usefully placed on the decision of the Apex Court in the case of **Renusagar Power Co. Ltd. V/s. General Electric co. and Anr.[AIR 1985 SC 1156],** which dealt with the scope of Section 3 of the Foreign Awards Act. The exposition in paragraphs 50 to 53, read thus:

"50. At the outset we would like to observe that the answer to the question whether Renusagar's suit which is in the nature of a petition under S.33 of the Arbitration Act could be stayed under S.3 of the Foreign Awards Act must necessarily depend upon a correct construction of the said S.3 and it is obvious that the provisions of that section will have to be construed by keeping in mind the objective sought to be achieved by that Act and its scheme and not on the basis of similar or analogous provisions that are to be found in the Arbitration Act, 1940 or the manner in which such similar or analogous provisions have been construed by our Courts. The Statement of Objects and Reasons shows that the Act seeks to achieve speedy settlement of disputes arising from international trade through arbitration. The Act is a successor to the Arbitration(Protocol & Convention) Act, 1937. The earlier Act was intended to effectuate the purposes of Geneva Convention of 1927; it was, however, felt that the Geneva Convention hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of the international trade due to certain defects and, therefore, in order to remedy, inter alia those defects, a draft Convention was prepared by the International Chamber of Commerce, which was considered by the United Nations Economic and Social Council in consultation with the Governments of the various countries and non-governmental organisations and finally a new International Convention on the Recognition and Enforcement of Arbitral Awards was adopted at New York on 10th June, 1958. This Convention was duly ratified by the Government of India and was deposited with the Secretary-General of the United Nations on 13th July, 1960. The present Act was enacted, as its long title indicates, to give effect to the said New York International Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which India is a party. Article II of the Convention provides for recognition by Contracting States of agreements, including arbitral clauses in writing, by which the parties to the agreement

undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration and S.2 of the Act defines the expression "foreign award" accordingly, i.e. closely following the language of Article II of the Convention. It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction. Moreover, an examination of the relevant provisions of this Act and the Arbitration Act, 1940 will show that the schemes of the two Acts are not identical and as will be pointed out at the appropriate stage there are various differences which have a material bearing on the question under consideration and as such decisions on similar or analogous provisions contained in the Arbitration Act may not help in deciding the issue arising under the Foreign Awards Act because just as the Arbitration Act, 1940 is a consolidating enactment governing all domestic awards the foreign Awards Act constitutes a complete code by itself providing for all possible contingencies in relation to Foreign awards made pursuant to agreements to which Article II of the Convention applies. With these preliminary observations we now turn to the question of proper construction of S.3 of the Foreign Awards Act.

51. Section 3 of the Foreign Awards Act, 1961 as amended by Act 47 of 1973, (omitting unnecessary words) reads as under :-

"3. **Stay of proceedings in respect of matters to be referred to arbitration.-** Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person

claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

It may be stated that prior to its amendment by Act 47 of 1973 the words in the old section 3 were: "if any party to a submission made in pursuance of an agreement" which were construed by this Court in Tractoroexport, case (1970) 3 SCR 53: (AIR 1974 SC 1) as prescribing a requirement that there must be an actual reference made to the arbitrators before any party to the arbitration agreement could invoke the section and Parliament immediately stepped in and amended the section by substituting in their place the words: "if any party to an agreement" thereby facilitating the stay of legal proceedings even before any actual reference is made and compelling speedy settlement of disputes through agreed arbitration. On a plain reading of the section as it now stands two things become very clear. In the first place the section opens with a non obstante clause giving overriding effect to the provision contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 or the Code of Civil Procedure, 1908. Secondly, unlike S. 34 of the Arbitration Act which confers a discretion upon the Court, Section uses the mandatory expression "shall" and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled. The conditions required to be fulfilled for invoking Sec.3 are :

> (i) there must be an agreement to which Article II of the Convention set forth in the Schedule applies. (It is not disputed that this is so in the instant case);
>
> (ii) a party to that agreement must commence legal proceedings against another party thereto. (It is again not disputed that Renusagar and G.E.C. are the two parties to the arbitration agreement and that Renusagar has commenced legal proceedings against G.E.C. by filing suit No.832 of 1982);
>
> (iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement. (The question whether this condition is fulfilled here needs to be decided);
>
> (iv) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings. (Admittedly this condition is fulfilled);
>
> (v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the 'existence and validity' of the arbitration agreement. (In the instant case these questions do not arise);
>
> (vi) the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect(scope) of the arbitration agreement touching the issue of arbitrability of the claims. (It will have to be dealt with while considering the satisfaction of condition (iii) above)."

In addition, reference can be usefully made to the discussion in paragraph 52 and 53 of this decision which elaborates on matters concerning clauses (iii) and (vi) above, as was put in issue in that case.

45. Dealing first with Section 3 of the Foreign Awards Act, it was not a provision empowering the Court to refer the parties to arbitration agreement to arbitrator, but only to stay the proceedings brought before it which would involve issues covered by the arbitration agreement. On the other hand, Section 45 is a provision mandating the Court to refer the parties to arbitration. Section 34 of the Arbitration Act, 1940 envisaged similar power in the Court as in Section 3 of the Act of 1961, but concerning domestic arbitration. In so far as domestic arbitration, in addition to power to stay the legal proceedings under section 34 of the Act of 1940, the Court was also empowered to separate the subject matter which should go to arbitration from the subject matter of the suit and then continue the suit in so far as it related to parties who have not joined in the arbitration or concerned with any part of the reference made to the arbitrators. As observed by the Apex Court in the case of **Firm Ashok Traders V/s. Gurumukh Das Saluja (2004) 3 SCC 155** (extract wherefrom has been reproduced by the Apex Court in majority decision of the Apex Court in the case of **Shin-Etsu Chemical Co. Ltd. V/s.Aksh Optifibre Ltd. & Anr.[(2005) 7 SCC 234]**), the decisions rendered under Arbitration Act of

1940 or under the Foreign Awards Act should be considered with caution, as the Act of 1996 purports to bring new approach to the arbitration. It is plainly clear that the scope of power of the Court under Section 3 of the Foreign Awards Act was materially different from that in section 45 of the Act, 1996. As aforesaid, Sections 3 of the Foreign Awards Act was a provision for staying the legal proceedings at the instance of the parties to an arbitration agreement, if any action was brought against him by any party or person claiming through or under such party, in respect of any matter agreed to be referred to arbitrator. That situation cannot be equated with the situation envisaged by section 45, which necessitates the Court "to refer the parties to arbitrator" subject however to the fulfilment of the matters specified therein. If all the parties to the suit are not parties to the arbitration agreement, the inevitable consequence would be to segregate the suit claim which is ascribable to matters covered by the arbitration agreement out of the whole claim. There is no such provision in the Act of 1996, nor there is provision to stay the legal proceedings, which was the regime provided prior to enactment of 1996 Act. Instead, the regime which prevailed prior to 1996 Act has been repealed. The observations in **Svenska**

Handelsbanken's case(Supra), therefore, at best, can be used for considering the later part of Sections 45 where the Court is required to find that the arbitration agreement has not become null and void, inoperative or incapable of being performed, as expounded in paragraphs 38 to 44 thereof. However, that enquiry will arise only on the finding recorded by the Court on the threshold issue that all the parties to the suit are parties to the arbitration agreement.

46. Reference was also made to the decision of the Apex Court in the case of **Bhatia International V/s. Bulk Trading S.A.& Anr.[(2002) 4 SCC 105].** Emphasis was placed on the observation in paragraph-26 of this decision. Reference was made by the Counsel for the Defendants to three decisions to contend that the scheme of section 8 pertaining to domestic arbitration was in contrast to the scheme envisaged under section 45 in relation to the international arbitration. Reliance was placed on **Shin-Etsu Chemical Co.Ltd.(supra)** and another decision of the Apex Court in **Bhatia International(Supra)** and yet another decision of the Apex Court in the case of **Learonal & Anr. Vs.R.B.Business Promotions Pvt.Ltd. & Anr.[2002(3) RAJ 24(SC)]**. The Apex Court has noted

the distinction between the two provisions. Indeed, the Apex Court has observed that the scope of power to be exercised by the judicial authority under the two provisions was not identical. These decisions however, are not authority on the proposition that even if all the parties to the suit are not parties to the arbitration agreement, the Court can proceed to refer all the parties to arbitrator under the respective arbitration agreements or for a consolidated arbitration or for that matter can split the action or parties and refer only the parties to arbitration agreement in relation to the subject matter of the suit to arbitrator. There is no provision in the Act of 1996 in that behalf. The Court has no power to do so.

47. Counsel for the Defendants relied on the decision of the Apex Court in the case of **State of U.P. V/s. Ram Chandra Trivedi [AIR 1976 SC 2547]**. Emphasis was placed on paragraph-22 of this decision which takes the view that it is not open to any one to urge with any show of force that the constitutional position emerging from the decisions of the Apex Court in regard to cases was not clear. It is also not open to the High Court to find any conflict by larger and smaller benches of this Court, it cannot disregard the

views taken by the larger benches. It is further observed that proper course for the High Court is to try to find out and follow the opinion expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court which practice, hardened as it has into a rule of law is followed by the Apex Court itself. According to the learned Counsel, this Court is bound by the dictum in **Svenska Handelsbanken(Supra)**, which is of a larger bench whereas **Sukanya Holdings's case(supra)** is decided by two judges bench and without adverting to the earlier decision of the larger bench. As observed earlier, the two decisions operate in different fields. There is no conflict, in any of the view. In so far as principle expounded in **Svenska Handelsbanken's case** is concerned, that will be relevant at best for considering the requirements of the later part of Section 45 of the Act.

48. Counsel for the Defendants were at pains to point out that as the Court was dealing with the New York Arbitration Convention of 1958, which is already subject matter of judicial decisions in Foreign countries where the New York Convention is invoked, applying the principles underlying those decisions, the Court should lean in favour of taking a liberal

view and hold that the Court has no option but to require the parties to refer their disputes to arbitration in relation to the subject matter in the suit which is ascribable to a valid and binding arbitration agreement. It was also contended that till the parties to the arbitration agreement were to take recourse to arbitration in relation to such matters, the Court in exercise of its inherent jurisdiction should stay the legal proceeding pending before it.

49. The argument though attractive will have to be turned down. In the first place, no such relief is claimed in the arbitration petition, as filed. The first relief in all these arbitration petitions is to refer the concerned defendants and the Plaintiff to arbitration in accordance with the respective arbitration agreement. The other relief is to stay the hearing of the Notice of Motion in Suit filed by the Plaintiff, till the decision on the present arbitration petition. Secondly, there is no provision analogous to section 3 of the Foreign Awards Act in the Act of 1996 on the basis of which this Court can pass such an order. Counsel for the Defendants however, submitted that even if there is no express provision in the Act of 1996, there is always inherent

power in the Civil Court, interalia, under section 151 of the Code. The Defendants would urge that having regard to the peculiar fact situation of the present case, it was obvious that the Plaintiff were resiling from their obligation under the arbitration agreement, inspite of the fact that the whole subject matter of the suit and in particular reliefs claimed by the Plaintiff are hinging upon essentially the JVA executed with Defendant No.1 and the Distribution Agreement executed with the Defendant No.5. The Plaintiff is common to both these agreements. Moreover, it is the case of the Plaintiff that the JVA and Distribution Agreement is one whole agreement coupled with the fact that the Plaintiff are stake-holders in the JV company- Defendant No.5, to the extent of 49% of equity holdings therein and the Defendant No.1 is also share-holder to the extent of 51%. In fact, the Defendant No.1 and Defendant No.5 were agreeable for common or consolidated arbitration inspite of separate arbitration agreements. In such proceedings, even the Defendant Nos. 2 to 4 would join and undertake to be bound by the outcome thereof, as the defendant No.1 is subsidiary company.

50. The argument of the Defendants clearly overlooks that express provision such as Section 34 of

the Arbitration Act, 1940 or Section 3 of the Foreign Awards Act, authorising the Court to stay the legal proceedings in such a situation, is not there in the Act of 1996. It is not a case of inadvertent omission by the legislature. The legislature consciously has done away with such a regime. It has not been done away with because there already exists such power in the Court under some other provision. This legislative change or intent cannot be brushed aside. Accepting the defendants' argument would inevitably result in rewriting the provisions of the Act of 1996. The scheme of Act of 1996 is indicative of implicit restriction on the Court to grant stay of the legal proceedings before it on such specious reasoning. The limited power now bestowed by the legislature on Court is to refer the parties to arbitrator. If that is not possible for tangible reasons, the Court cannot and ought not to exercise its inherent powers under Section 151 of the Code. The Court is expected to exercise its inherent powers to meet the ends of justice, which is purposive. It is also well established position that interim relief should be granted in aid of the main relief. Unless the main relief can be granted to the Defendants, ascribable to section 45 of the Act, the question of invoking inherent jurisdiction to stay the legal

proceedings(suit filed by the Plaintiff) does not arise. It will be an order in excess of jurisdiction.

51. Counsel for the Defendants had relied on the decision of the Apex Court in the **Ramji Dayawala & Sons (P) Ltd. Vs. Invest Import [AIR 1981 SC 2085]** The said decision relates to provisions of Arbitration Act, 1940 and section 3 of the Arbitration (Protocol and Convention) Act, 1937. In paragraph-19 of this decision, the Court has considered the sweep of section 34 of the Arbitration Act, 1940 as to when an order of stay should be granted and the burden is placed on which party. It is also noted that even if section 34 was not attracted, the Court would consider the prayer for stay in exercise of its inherent jurisdiction under section 151 of C.P.Code. But in that case the burden will be on the party seeking stay to establish facts for exercising discretion in favour of the said party. In the present case, there is no application under section 151 of C.P.C. But I am called upon to consider a petition under section 45 of the Act. It will be a different matter to grant stay of legal proceedings during the pendency of the Arbitration petition. To do so, the Court would have inherent jurisdiction to grant stay of legal action brought by the Plaintiff. But upon disposal of the

Arbitration Petition under section 45, that power would cease. In other words, the power under section 151 of C.P.C. would subsist so as to stay the legal action, only till the hearing of the substantive petition under section 45 of the Act and cannot transcend beyond the date of dismissal of such petition. Moreover, for the reasons already recorded earlier, there is no question of staying the Suit either in whole or in part without any purpose. That could be done only if there was express provision analogous to Section 3 of the Foreign Awards Act and not otherwise.

52. Reliance was placed by the Counsel for the Defendants on the commentary on the **Law and Practice of Commercial Arbitration in England, Second Edition by Sir Michael J. Mustill and Stewart C. Boyd,** which has dealt with the issue of multiple arbitrations, multiple defendants, third party situations, their problems and solutions. This commentary also deals with the paradigm of arbitration agreement being null and void, inoperative or incapable of being performed. Reliance is then placed on the decision of the High Court of Justice, Chancery Division in the case of **Lonrho Ltd.(U.K.) ;Companhia do Pipeline Mocambique Rodeshia Sarl(Mocambique) V/s. The Shell Petroleum**

Company Ltd.(U.K.); The British Petroleum Company Ltd.(U.K.) and ors. reported in Court Decisions on New York Convention 1958 at page 320. The principle stated in this decision is essentially founded on the mandate of section 1 of Arbitration Act, 1975 as applicable to England, that gave no option to the Court but stay the proceedings or the action in between the Plaintiff and such defendants who are parties to the arbitration agreement. Significantly, Section 1 of the Arbitration Act, 1975 is parameteria to section 3 of the Foreign Awards Act. That decision will have to be examined with caution, just as the decision of our Apex Court in **Svenska Handelsbanken(supra)**-which deals with similar provision, namely, section 3 of the Foreign Awards Act.

53. Counsel for the Defendants would then rely on the decision in the case of **Gorthon Invest AB Vs. Ford Motor Co.Ltd.[(1976) 2 Lloyd's Rep.720]**. Even in this case, the Applicant had applied for the English action to be struck out and that all further proceedings be stayed on the ground that they were frivolous, vexatious and embarrassing and/or abuse of the process of the Court. That is not the relief which is required to be considered in the context of

section 45 of the Act of 1996. Besides, the relief considered in the said matter was for stay of legal action. That was required to be granted in view of the statutory provision which is analogous to section 3 of the Foreign Awards Act.

54. Counsel for the Defendants had then pressed into service decision in the case of **Kaverit Steel & Crane Ltd. Vs. Kone Corporation [1992 Carswell Alta 226].** Even in this case, licensor sought stay on the sole ground that the dispute should be referred to arbitration. The Court was called upon to consider complicated question on account of two facts. First, the suit adds parties, both Defendant and plaintiff, who are not party to the agreement containing the arbitration clause. Second, the claim by the distributor contained allegations beyond simple breach of that contract. Indeed, in the present case, the facts are some what similar. In that, Defendant No.2 to 4 are not parties to Arbitration Agreement. Moreover, Defendant No.1 and Defendant No.5 are parties to separate arbitration agreements where the Plaintiff is common in relation to the JVA, Shareholders Agreement as well as Distribution Agreement. That being the position strong reliance is placed on this decision, where the Court not only

stayed the legal action but referred all issues between the Distributors and licensor to arbitration. In that case, the Chamber Judge had taken the view that referring the parties to arbitration would not be feasible as the arbitration agreement governs some of the issues in the Statement of Claim but not all. He then went on to hold that because of other issues nothing should go to arbitration. In an appeal before the Alberta Court of Appeal, in the reported decision, that view was overturned. It is noted in paragraph-8 that the International Commercial Arbitration Act which is based on New York Convention commands that what may go to arbitration shall go and no convenience test limits references. While dealing with the issue of extra parties to the suit, the Court observed that the real thurst of the complaint of the licensor about extra plaintiff was that they had no cause of action because the claims they made were "derivative", meaning that they relied only upon shares held by a corporation in which they were shareholders. In para-13 of this reported decision, the Appeal Court upheld the view of the Chamber Judge that the Court has no authority to order those other plaintiffs (who are not parties to the arbitration agreement) to submit their claims to the arbitration. But then, the Appeal Court went on to observe that the Chamber Judge

could have stayed the legal action pending arbitration if needed, as the claims of those extra Plaintiffs were derivative in form which could have awaited the arbitration decision.

55. I have already addressed the question whether the Civil Courts in India have the power to grant stay of the legal proceedings, in the earlier part of this decision. In so far as legal position in our country after enactment of Act of 1996, there is no express power in the Court to stay the legal action. Moreover, the third parties or for that matter even the parties to the arbitration agreement cannot be compelled to accept the participation of third parties in arbitration, muchless in terms of the order of Court. For, the process of arbitration is a concensual mechanism available to the parties.

56. In para-19 of the same reported decision in **Kaverit Steel & Crane Ltd.**, the Court went on to observe that forcing the subsidiaries to partake in the arbitration may well be sensible and practical. But the Court held that, it is for the parties or the Legislature, and not the Court to decide what procedure is right in this case. Accordingly, this decision will be of no avail to the Defendants, so

long as the Defendant No.2 to 4 continued to be parties to the suit claim and also because the Plaintiff is not inclined to accept their offer of allowing them to join the arbitration proceedings as they are not parties to the arbitration agreement. It is not open for this Court to force the Plaintiff to permit the Defendant Nos. 2 to 4 to partake in the arbitration proceedings which could be resorted to on the basis of respective arbitration agreements, or for that matter to direct consolidation of arbitration. There is no such power in the Civil Courts in India under the Act of 1996. Arbitration is essentially a concensual matter and forcing the parties to go for arbitration will be anathema to such mechanism. I find substance in the stand taken on behalf of the Plaintiff that as of now, it is not possible to assume that the Defendant Nos. 2 to 4 are not proper parties to the suit, even if not necessary parties. There are averments in the plaint which may justify their presence. Neither any formal application has been moved on behalf of any of the defendants nor any oral argument has been advanced as to why the Defendant Nos.2 to 4 are not proper parties in the suit. So long as the said defendants continue to be parties to the Suit, the question of splitting of suit claim or requiring the defendant no.2 to 4 to join arbitration

proceedings inspite of resistance from the Plaintiff will not arise. There is no such power in this Court.

57. I shall now deal with the second limb of the Plaintiff's justification for institution of the present suit. According to the Plaintiff, there are separate arbitration clauses contained in JVA and related agreements which are signed only by the parties to the respective agreements and there is strong possibility of two or more Arbitrations as per the respective agreements in relation to the subject matter of the present suit, resulting in arbitration agreements becoming inoperative or incapable of being performed. In the first place, such a plea will be in the teeth of the legal position stated by the Apex Court in the case of **Svenska Handelsbank's case(see paras 40 to 44 thereof),** while expounding as to when the arbitration agreement can be said to have become inoperative or incapable of being performed. The fact that there are separate agreements and would result in separate arbitration cannot result in arbitration agreement becoming inoperative or incapable of being performed.

58. There is yet another reason to discard the Plaintiff's claim that the respective arbitration

agreements have become inoperative or incapable of being performed. Inasmuch as, the Plaintiff has brought the present action before this Court founded on JVA and Distribution Agreement. JVA is executed between the Plaintiff and Defendant No.1, whereas the Distribution Agreement is executed between Plaintiff and Defendant No.5. As there are two separate agreements, there is possibility of two separate arbitration, but that is inevitable. That is what the parties have chosen for. That cannot be the basis to hold that the arbitration agreement has become inoperative or incapable of being performed.

59. Significantly, it is the Plaintiff's own case that the Distribution Agreement is related agreement to the JVA; and that the separate agreements were one whole agreement. Besides, the Plaintiff is stakeholder alongwith Defendant No.1 in the Defendant No.5-JV company. From the different provisions of the two agreements, it does appear that the JVA is the principal agreement and the Distribution Agreement is the related agreement to the JVA. The Distribution Agreement is inseparable from the JVA. The Distribution Agreement is so intricately connected with the JVA and vice versa, that the legal relation between the parties would be snapped on the

determination of the Distribution Agreement. Reliance has been rightly placed by the Counsel for the Defendants on the unreported decision of our High Court in the case of **Jet Airways(India) Ltd. V/s.** Mr.**Subrata Roy Sahara decided on 28th February, 2007 being Notice of Motion No.3777 of 2007 in Suit No.1832 of 2006.** The learned single Judge of this Court, on adverting to the stipulations in the relevant agreements therein, proceeded to hold that the dispute arisen between the parties as to the invocation of the personal guarantee will be the dispute arising in connection with the SPA, as amended by the Amendment Agreement and the dispute will be covered by clause 19 of the SPA (principal agreement). For taking this view, the Learned Judge relied on the decision of the Apex Court in the case of **S.Chattanatha Karayalar V/s. The Central Bank of India Ltd.reported in AIR 1965 SC 1856**; which takes the view that where the transaction between the "same" parties is contained in more than one document, all those documents must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. In the present case, on scrutiny of definition of "Related Agreement" in Article 1.1. of JVA r/w Articles 5.1, 5.9 and in particular, 13.1, 13.10, 13.11 of the JVA; and Articles of the Distribution

Agreement-Article 2.1, 2.6, in particular 16.6 and 16.11; as also Article 1(l) defining the term "Related Agreements" read with Article 8 of Shareholders Agreement; on conjoint reading of these clauses, there is no doubt that the related agreements are integral part of the JVA. This is so even though the Distribution Agreement is signed only between the Plaintiff and the Defendant No.5. Indubitably, the Defendant No.5 JV company, is in the nature of partnership firm formed by the Plaintiff and Defendant No.1. Although it is a case of two separate agreements, it is one whole agreement between the same parties. I am conscious of the fact that the Defendant No.5 is a separate juristic person having been registered under the provisions of the Companies Act. Nevertheless, it is completely controlled by the Plaintiff and Defendant No.1 together in partnership. In that context, it is observed that the Distribution Agreement signed by Defendant No.5 is between the same parties. In fact, that agreement is appendage to JVA and integral part thereof. If it is so, there is no question of agreement having become inoperative or incapable of being performed. Assuming that there are two separate agreements in relation to which the reliefs are claimed in the action brought before this Court and the fact that there would be two

arbitrations, even then it cannot be the legal basis to hold that the agreements have become inoperative or incapable of being performed.

60. Reliance was also placed on the decision in the case of **Olympus Superstructures Pvt.Ltd. Vs. Meena Vijay Khetan & Ors.[AIR 1999 SC 2102],** which Judgment deals with the provisions of the Act of 1996. It arose out of the three main agreements executed between the parties. In that case there were three main agreements and three other separate agreements. In paragraph-25 of this decision, the Apex Court considered the point that the main agreement relating to construction of flats and the arbitration clause therein is general and it is not referred to any named arbitrator, whereas in the arbitration agreement in relation to the Interior Design Agreement provides for specific arbitrator. The Court went on to observe that the agreement relating to construction of flats permitted reference to arbitration not only on issues arising out of the main agreement but also those disputes or differences which are connected with disputes arising out of the main agreement. Those aspects have been considered in paragraph-27 onwards and the Court concluded that general arbitration clause in the main agreement would govern the

situation. Even in the present case similar approach could have been adopted inspite of three separate agreements. More importantly because JVA is the principal agreement which refers to matters covered by the related agreement. At the same time, related agreements executed between the parties concede the position that JVA would prevail over the related agreements. Besides, as has been already found, the related agreements formed integral part of the JVA and are appendage to the said agreement, which position is conceded by the Plaintiff in paragraph-46(a) of the Plaint. For, the Plaintiff asserts that the JVA and Distribution Agreement form one single agreement alongwith the other Related Agreements. Inspite of this finding, there is still difficulty in accepting the claim of the Defendants to refer the parties to arbitration. That is because of the fact that all the parties to the Suit are not parties to the arbitration agreement. Failure to comply with the said threshold requirement, finding on other matters though in favour of the Defendants will be of no avail. It is well established that parties cannot be forced to take recourse to arbitration. That has to be consensual and not under the Order of the Court. Indubitably, there can be no order of the Court unless there is power conferred on the Court by Law in that behalf.

As the Defendant Nos. 2 to 4 are not parties to the arbitration agreement, the question of referring only the Plaintiff, Defendant No.1 and/or Defendant No.5 to arbitration does not arise, as there is no provision in the Act of 1996 for splitting of cause or parties and referring the subject matter of the Suit to arbitrator. Either the entire matter has to go before the arbitrator or not. There can be no midway approach, which perhaps could have been resorted to if the provision such as section 3 of the Foreign Award Act was still on the statute book.

61. Counsel for the Plaintiff had invited my attention to the unreported decision of this Court dated April 8, 2004 in Notice of Motion No.778 of 2004 in Suit No.233 of 2004 between the **Chloro Controls(India) Pvt.Ltd. V/s Severn Trent Water Purification Inc.and ors.** In that case the Court declined to refer the parties to arbitration on the reasoning that if the Court was required to conclude that there was something like parent agreement/main agreement, subsidiary and incidental agreement, it would have to go into the question whether the shareholders agreement is the main agreement and others are mere attachments and appendixes thereto. The Court ruled that the entire exercise would be

bifurcation of the cause in action as well as bifurcation of the parties. The Court noted that under the garb of finding out as to whether the matter in the suit is covered by the arbitration agreement, the Court would not embark on such a course, in absence of express provisions in the Act enabling the Court to do so. The view so expressed is essentially following the dictum of **Sukanya's case**. Even that case was governed by the provisions of Section 45 of the Act concerning international arbitration. It is not necessary for me to embark upon the correctness of the view expressed in the said decision that the Court had no power to find out whether all the agreements were one agreement. In my view, that question may have to be considered in the context of the later part of section 45 of the Act which obligates the Court to examine whether the agreement had become null and void, inoperative or incapable of being performed. The view to be so expressed would obviously be a prima facie view, as observed by the Apex Court in **Shin-Etsu Chemical Co. Ltd.(supra).** However, to the extent the decision follows the principle underlying the exposition in the case of **Sukanya (supra)**- that the Court has no power to split the cause or parties and refer the parties to the arbitrator in absence of provisions in the Act in that behalf, I am in

agreement with that opinion.

62. Counsel for the Plaintiff has invited my attention to the decision of **Tribunal De Milano** decided on 22nd March, 1976, in the case of **Sopac Italiana S.p.a. Vs.Bukama GmbH (F.R.G.) and F.I.M.M.(Italian).** In that case, the Court found that the international arbitration had become inoperative as the action brought before the Court was in respect of other disputes and extra parties, who were not connected with the arbitration agreement. It is not necessary to elaborate on this judgment. In the present case, I would proceed on the finding that all the three agreements form one whole agreement for which reason the Plaintiff, Defendant No.1 and/or Defendant No.5 could be referred to arbitrator. But that finding is no solution to the problem posed before this Court. The problem would still remain unanswered as the Defendant Nos. 2,3 and 4 are not parties to the agreements; and this Court has no power to direct such parties to go for arbitration-unless it was a consensual decision of all the parties to the suit that the Defendant Nos. 2,3 and 4 could also join such arbitration.

63. One of the issue that was raised on behalf of

the Defendants at the hearing was that going by the averments in paragraph-56 to 59 of the plaint, the Plaintiff has brought action before this Court which is a derivative action for and on behalf of and for the benefit of the Defendant No.5 JV company. Counsel for the Defendant has invited my attention to the decision of our High Court in the case of **Rashmi Mehra & Ors. V/s. EAC Trading Ltd. & Ors.[2007(2) Mh.L.J. 737]**, which deals with the issue as to whether derivative action can be brought in the matter of arbitration. However, counsel for the Defendants in all fairness lateron pointed out that not only the operation of the said Order but even the Judgment has been stayed by the Apex Court on 30th July, 2007. As a result, it is doubtful whether reliance can be placed on the said judgment as a binding precedent. In any case, for the reasons already indicated, it is not necessary to dwell upon the issue of permissibility of derivative action in the matter of arbitration. Inasmuch as, the threshold requirement having remained unfulfilled, the Court cannot assume jurisdiction to exercise power under section 45 of the Act.

64. My attention was also drawn to the decision of the Apex Court in the case of **Shin-Etsu Chemical**

Co.Ltd.(Supra), which however deals with the question as to the nature of adjudication, that is contemplated by section 45 of the Act when the objection about agreement being null and void, inoperative or incapable of being performed is raised before the judicial authority. The majority view is that the opinion so recorded would be only prima face. Reference was also made to decision of the Division Bench of our High Court in the case of **Caribjet Inc.Vs.Air India Ltd.[2007 (3) Mh.L.J.166]**, which has followed the abovesaid view expressed in **Shin-Etsu Chemical Co.Ltd.(Supra)**. That aspect would have been relevant only if, the Defendants were to succeed in overcoming the deficiency of the threshold requirement ascribable to the former part of Section 45 of the Act.

65. Counsel for the Defendants had also relied on the decision of the United States of Appeals, Third Circuit in the case of **Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riasscurazoni V/s. Achille Lauro d/b/a Acchille Lauro Armatore, a/k/a Achille Lauro, d/b/a Flotta Lauro, a/k/a Achille lauro d/b/a Lauro Lines, X Company and Antonio Scotto di Carlo[712 F.2d 50]**. The Court after referring to gamut of case law observed in paragraph-3 as follows:

> "None of the limited secondary literature sheds so clear a light as to suggest a certain answer. However, we conclude that the meaning of Article II Section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only(1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, see Ledee V. Ceramiche Ragno. G84 F.2d 184(1st Cir.1982); I.T.A.D. Associates Inc. V. Podar Brothers, 636 F.2d 75 (4th Cir.1981), or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate. As the Supreme Court observed in Seherk V.Alberto Culver Co. 417 U.S.506, 507 n.10,94, S.Ct.2449, 2451 n.10,41 L.Ed.270(1974):
>
> The goals of the Convention, and the principal purpose underlying American 54 adoption and implementation of it, was to encourage the recognition and enforcement of commercial contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. In other words, signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to unfolding agreements to arbitrate. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum, and hence the agreement is not void."

This decision is of no avail because, in the present case there are extra parties to the suit. There is no provision in the Act of 1996 empowering the court to

split the cause or parties, or to grant stay of the legal action unlike the provision which obtained in Section 3 of the Foreign Awards Act, which has been repealed by the Act of 1996.

66. Counsel for the Defendants had relied on the relevant extracts from the commentary in the **New York Arbitration Convention of 1958- towards a Uniform Judicial Interpretation by Albert Jan van den Berg, 1981 Edition,** which has exhaustively dealt with the issues referral to by the Court to arbitration in view of Article II(1) and (3) of the New York Convention. It deals with the decisions of different Courts to which New York Convention is applicable, including the decisions of Court in India. The essence of the decisions is that referral by the Court is mandatory. The meaning of words "null and void, inoperative and incapable of being performed have also been exhaustively considered with reference to several decisions. The Author has dealt with the cases which may involve consolidation of cases concerning identical claims which, if no consolidation had been ordered might have led to two different proceedings: the arbitration between ship-owner and the charterers and a court action between the ship-owner and the guarantor. Exposition referred to therein however, is

founded on the provisions of the United States law which empowers the Court to order consolidation of cases. There is no such provision in the Act of 1996. The Author has also referred to the matters on multi-party disputes and to the solutions found by some of the Courts. That however, could have been possible if the provisions such as section 3 of the Foreign Awards Act was available to the Courts in India.

67. Reliance was also placed on the decision in the case of **City of Prince George Vs. A.L.Sims and Sons Ltd. and McElhanney Engineering Services Ltd.decision of the British Columbia Court of Appeal [1995 CarwellBC 365]**, which had occasion to deal with the multiple parties and multiple issues which are interrelated and some, but not all, defendants are bound by an arbitration clause. It is held that it is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause. However, the relief that was prayed and granted was of stay of legal action on the basis of law which mandated the Court to pass such order. The provisions of section 3 of the Foreign Awards Act, which now stands repealed upon enactment of Act, 1996, was analogous to such power invested in the Courts in

India. In absence of such a provision in the Act of 1996, it is not possible for this Court to entertain request to stay the legal action brought by the Plaintiff even if the finding in relation to the later part of section 45 of the Act is answered in favour of the Defendants having regard to the fact situation of this case.

68. On the other hand, Counsel for the Plaintiff has relied on the commentary titled **Law and Practice of International Commercial Arbitration by Alan Redfern and Martin Hunter.** Reliance was placed on the extracts in the commentary which deals with the issue of multi-party arbitration, the problems arising out of the several parties to one contract, several contracts with different parties. The Author has observed that the Courts have been sceptical in such a situation, even though some of the Courts have found out novel ways of addressing the problem. The Author has referred to the view expressed by **Lord Denning** in one such action. While dealing with the case referred to therein, Judgment in the English Court of Appeal, Lord Denning, plainly wished that an order could be made consolidating the two sets of arbitral proceedings, so as to save time and money and to avoid the risk of inconsistent awards; Lord Denning

observed:

> "As we have often pointed out, there is a danger in having two separate arbitrations. On a case like this, You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases ... it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the self-same question, such as causation. It is very desirable that everything should be done to avoid such circumstances."
>
> However, the Court recognised that it was powerless to order consolidation without the consent of all parties:
>
> "There is no power in this court or any other Court to do more upon an application such as this than to appoint an arbitrator or arbitrators, as the case may be; we have no powers to attach conditions to that appointment, and certainly no power to inform or direct an arbitrator as to how he should thereafter conduct the arbitration or arbitrations".
> . .
>
> "It seems to me that there is ample power in the court to appoint in each arbitration the same arbitrator. It seems to me highly desirable that this should be done so as to avoid inconsistent findings."

69. The Author has also referred to the Statement of the Former Secretary-General at the ICC Court of Arbitration who observed as follows:

> "No generally acceptable solution to the manifold issues arising from multiparty arbitrations has yet been found by either the ICC or any of the dozens of other scholars, lawyers and arbitral institutes working on this issue."

70. The Author has also addressed the Problem under the head "Court ordered consolidation". The cases referred to were obviously dealt with by the concerned courts on the basis of express power conferred on the Court by Municipal law. As a General rule, consolidation of connected arbitration could be possible only if the parties agree for such mechanism. There is no provision in the Act of 1996 which would empower the Court to consolidate separate arbitrations involving the same or similar issues between the parties.

71. Counsel for the Plaintiff has also relied on the **commentry-Comparative International Commercial Arbitration by Julian D M Lew & Ors.[(2007 Ed.) pg.405].** which deals with the issue of consolidation of different arbitration between the same parties. The author has noted that there is considerable difference in matters of consolidation of different arbitration between the same parties and the analogy of multi-party situation is incomparable though at the first site, the problem whether the consolidation of separate proceeding between the same parties in limited contract situation is possible would seem to be feasible. The Author has also dealt with the problems of enforcing the awards in multi-party

arbitration to wit, as follows:

5. PROBLEMS OF ENFORCING AWARDS IN MULTIPARTY ARBITRATION

16-94 There is a real issue whether in arbitration award rendered in multiparty proceedings can be enforced. Under the New York Convention there are three fundamentals for enforcement. First, the parties must have agreed to submit their differences to arbitration. Second, the arbitrators must not have exceeded their authority. Third, the conduct of the arbitration must be fair.

16-95 Where the agreement is between two parties, they are the legitimate parties to the arbitration. If a third party is joined, or another dispute or arbitration is consolidated to the first arbitration, this may violate the fundamental agreement between the two parties to submit their disputes to arbitration.

16-96 Whether the award against or in favour of the third party joined to the arbitration, or involving the party or parties to the consolidated arbitration, can be enforced, will depend on whether there was agreement of all the parties concerned to the joinder or consolidation. If the parties have all agreed on the joinder or consolidation, the award should be enforceable. However, where a tribunal, an institution, appointing authority or a national court has authority to order joinder or consolidation the issue is far from clear.

16-97 It is doubtful whether an award arising out of consolidated arbitration proceedings would be enforceable under the New York Convention. The expansion of multinational arbitrations has not undermined the fundamentals of party autonomy and the New York Convention. The most obvious basis for refusal to enforce an award should be the absence of an appropriate arbitration agreement between the parties.

16-98 Article IV(1) New York Convention

> requires, as a precondition for enforcement, that the arbitration agreement be filed with the court, this will show who the parties were to the arbitration agreement. The New York Convention allows a court to refuse enforcement of an award if a party was unable to present its case, or the composition of the tribunal or the procedures were not as agreed. To overcome this situation, tribunals and institutions should encourage the parties to record their agreement to joinder or consolidation. This can be in the terms of reference or in some other document, or the tribunal can record it in the procedural directions or other early procedural decisions.
>
> 16-99 Arbitrators must always be careful to ensure that they treat all the parties equally. In reaching conclusions in a dispute between two parties, the tribunal should not be influenced by extraneous evidence to the dispute from a third party, especially if one party has not been able, or has refused or failed, to refute or respond to claims on the basis that the third party is not properly a party to the arbitration. The tribunal's jurisdiction is properly prescribed by the terms of the agreement to arbitrate and must not make decisions or consider issues outside that scope. If the tribunal does go beyond its authority it could provide a basis for a court to refuse enforcement of the award under Article V(1)(c) New York Convention." (emphasis supplied)

72. Reference was also made to the decision of the Full Bench of our High Court in the case of **J.S.Ocean Liner LLC Vs. M.V.Golden Progress & Anr.[2007(2) Arb. L.R. 104(FB)(paras 75).** The question in that case however, referred to the Full Bench was, as to whether the Civil Court of original jurisdiction in District which is empowered to exercise admiralty jurisdiction

can or cannot make any order for arrest of vessel in an application under section 9 of the Arbitration Act. That has been answered in the negative by the Full Bench.

73. Reliance was also placed on the decision on the decision of single Judge of our High Court in the case of **Global Marketing Direct Ltd. Vs.GTL Ltd. & Anr. [2004(3) Arb.L.R.56(Bombay)(paras 10 to 12)]**. The subject matter of the Suit in that case related to two independent agreements between the parties. The Civil Court was called upon to decide whether it had jurisdiction to proceed with the suit. That application was made after parties had already resorted to arbitration and final award was also passed. The Court relying on the decision of the Apex Court has noted that the Civil Court inspite of an arbitration continues to have jurisdiction and that jurisdiction can only be ousted in a manner provided under section 8 or section 45 or section 54 of the Act of 1996.

74. Counsel for the Plaintiff had also relied on the decision of the Apex Court in the case of **Smt.Ganga Bai Vs. Vijay Kumar & Ors.[(1974) 2 SCC 393**, as also decision of the Kerala High Court in the

case of **The District Manager Food Corporation of India Vs. Mardestine Compania Naviera[AIR 1977 Kerala 108(DB)**], which decisions have restated the legal position that the right to institute a suit and to proceed with the suit in the Ordinary Civil Courts of the land is a very valuable civil right. It is inherent right to bring suit of civil nature and unless the suit is barred by statute, one may, at ones peril, bring a suit of one's choice.

75. The learned Counsel for the Plaintiff has also relied on the decision of the Constitution Bench of Seven Judges of the Supreme Court in the case of **SBP & Co. Vs. Patel Engineering [(2005) 8 SCC 618]** to contend that the majority judgment in **Shin-Etsu Chemical Co. Ltd.(Supra)** is inconsistent with the view expounded by the Constitution Bench in particular on the efficacy of the opinion on matters to be adjudicated in the context of later part of section 45 of the Act, whether should be final or a prima facie view. According to the learned Counsel the Constitution Bench of seven Judges (by majority of 6) has held that the decision under section 11 of the Arbitration and Conciliation Act, 1996 of the Chief Justice of High Court in the case of Domestic Arbitration or the opinion of the Chief Justice of

India in the case of International Commercial Arbitration was final and not open to review or reconsideration by the arbitral tribunal, notwithstanding the provisions of section 16 of the Arbitration and Conciliation Act, 1996. The Counsel for the Plaintiff would submit that the decision **Shin-Etsu Chemical(Supra)** would require reconsideration.

76. It is not necessary for me to address on those matters. The point in issue that arise for my consideration however, can be disposed of on the view already expressed in the earlier part of this Judgment.

77. In the ultimate analysis, I have no hesitation in taking the view that power under sections 45 of the Act to refer the Plaintiff and defendant No.1 and/or Defendant No.5 to arbitration cannot be exercised in the fact situation of the present case, on the finding that there are extra parties to the suit. Inasmuch as, it is not possible for this Court to split the cause or parties to any of the agreements which are subject matter of the present suit. It is also not possible for this Court to order consolidation of arbitration. The threshold requirement is that all

the parties to the suit should be parties to the arbitration agreement, so as to invoke section 45 of the Act. Although it may not be necessary for me to elaborate on the matter put in issue as to whether the whole of the subject matter of the suit includes subject matter of the arbitration agreement or whether there are other disputes arising in the legal action brought before this Court. I have already opined that going by the frame of the suit the cause of action and reliefs claimed in substance revolve around JVA and the Distribution Agreement. The Plaintiff is common to the three agreements, but not the other parties. Be that as it may, the issues raised in the suit regarding mismanagement of the affairs of the Defendant No.5-JV company or the activities not being in the public interest could have been addressed even in the arbitration proceedings. In fact, the Plaintiff could have taken those issues before the Company Judge having regard to the provisions of Section 397 and 398 of the Indian Companies Act, 1956(as amended).

78. It is common ground that the Defendant No.2,3 and 4 are not parties to the arbitration agreement. In so far as these Defendants are concerned, the Plaintiffs have asserted that they are proper parties

to the suit, if not necessary parties. The Defendants have not called upon this Court to delete or strike out the defendant Nos. 2, 3 and 4 from the array of parties on the ground that they are neither necessary nor proper parties. Left with this situation, the Court has no option but to deny reliefs as claimed in the Arbitration Petitions.

79. During the course of hearing, it was suggested to the parties to find out a workable and acceptable solution. Counsel for the Defendants made without prejudice offer on behalf of the Defendants in the following form:

> "(1) All disputes and differences arising between the parties to the above suit in respect of or relating to the Joint Venture Agreement dated April 22, 1998 and/or the Related Agreements (as defined in the Joint Venture Agreement) and all claims raised in Suit No.1847 of 2007 are hereby referred to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce to be finally settled by one or more arbitrators appointed in accordance with the said Rules.
>
> (2) The arbitration shall be held in London, England and the substantive law shall be Indian law.
>
> (3) Until the ICC Arbitration panel in London is constituted and for a period of four (4) weeks thereafter, but in no event more than eight (8) weeks from the date the parties have agreed to and accepted this

> order of arbitration but subject to any orders that the ICC Arbitration panel may pass, Defendant No.5, (i.e.,Chiron Behring Vaccines Private Limited), states that it shall not appoint any of the Defendants Nos. 1 to 4 in Suit No. 1847 of 2007 or any third party as a distributor or in any other capacity to distribute and market the Rabipur Vaccine in the HMR Territory, i.e., India and Nepal."

80. However, the offer so made on behalf of the Defendants though appears to be sensible arrangement to be arrived at between the parties, has not been accepted by the Plaintiff. According to the Plaintiff, there will be uncertainty as there are authorities which have taken the view that such an arrangement will be vulnerable and the Award may not be enforced. The Plaintiff on the other hand, gave without prejudice offer in the following form:

> "(i) It is proposed that all disputes and differences raised in Suit No.1847 of 2007 including the disputes and differences raised by Defendant No.1 in its letter dated 11th July, 2007 (Exhibit "C", Pg.285 to Arbitration Petition (Lodging) No.394 of 2007) be referred to arbitration under the Arbitration and Conciliation Act, 1996 ("the Act") and in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in conformity with those Rules.
>
> (ii) The place of arbitration shall be Mumbai and the arbitration shall be governed by the laws of India.
>
> (iii) The status quo qua the Marketing and

> Distribution Agreement (HMR Territories) as of today will continue till the arbitration panel is constituted and passes appropriate orders on application for interim relief."

81. To this Offer, the principal objection of the Defendants is to the change of place of arbitration and on account of apprehensions entertained by them because of the proposed place of arbitration. Suffice it to observe that the parties are not able to arrive at any consensual arrangement. For that reason, it is not open for this Court to direct the parties to the suit to go for arbitration under the orders of Court, which would be anathema to the Arbitration mechanism itself.

82. Accordingly, all the three arbitration Petitions will have to be rejected.

83. To complete the record, it is necessary to mention that in view of the objection taken on behalf of the Plaintiff regarding the nature of relief claimed in the Arbitration Petition No.302 of 2007, the Petitioner(Defendant No.1) has taken out Chamber Summons No.1458 of 2007 as well as has asked for appropriate relief by way of separate Arbitration Petition No.375 of 2007. In so far as the Chamber Summons is concerned, in the interest of justice, the

same is made absolute in terms of prayer clause (a) and (b). The Petitioner in the said petition to carry out amendment forthwith.

84. That leaves me with the Order to be passed on the Notice of Motion. As the Arbitration Petitions are rejected, it necessarily follows that the Notice of Motion will have to proceed for consideration of ad-interim relief, as is pressed on behalf of the Plaintiff, in view of the urgency pointed out by the Plaintiff. However, as the Counsel for the Defendant No.5 has already made statement before this Court on 14th September, 2007, as recorded in the order, which will enure for a period of four weeks from today and which arrangement has been agreed upon by the Defendant Nos. 1 to 4 without the Defendant Nos.2 and 3 submitting to the jurisdiction of this Court, it is not necessary to dwell upon the points in issue arising in the Notice of Motion for the time being. Instead, the Notice of Motion is ordered to be listed on 31st October, 2007, under caption "ad-interim relief".

85. Accordingly, following order is passed.

(i) Chamber Summons No.1458 of 2007 is

made absolute in terms of prayer clause (a) and (b) with no order as to costs. Petitioner to carry out amendments granted under this Order forthwith.

(ii) All the three Arbitration Petitions being Arbitration Petition Nos.302 of 2007, 348 of 2007 and 375 of 2007 are rejected with no order as to costs.

(iii) Hearing of the Notice of Motion for consideration of ad-interim relief is deferred till 31st October, 2007, to be listed under caption "ad-interim relief". In the mean time, the statement made on behalf of the Defendant No.5 which has been accepted by the Defendant Nos. 1 to 4 without Defendant Nos. 2 and 3 submitting to the jurisdiction of this Court as recorded in the Order dated 14th September, 2007 shall continue to operate.

86. All concerned to act on the authenticated copy of the Order.

(A.M.KHANWILKAR,J)